

THIS DISPOSITION IS  
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Chatam International Incorporated  
v.  
Indomita Wine, S.A.

Opposition No. 91155603  
to application Serial No. 76416324

Paul M. Lewis of Charles Jacquin et Cie., Inc. for Chatam International Incorporated.

Thomas P. Philbrick of Allmark Trademark Service for Indomita Wine, S.A.<sup>1</sup>

Before Hairston, Drost, and Walsh, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On June 3, 2002, Indomita Wine, S.A. (applicant) filed an intent-to-use application (Serial No. 76416324) to register the mark QUINTUS in standard character form on the Principal Register for "wine" in Class 33.

On February 27, 2003, Chatam International Incorporated (opposer) filed an opposition to the registration of applicant's mark. Opposer alleges that it is the owner of a

<sup>1</sup> Applicant did not file a brief in this proceeding.

registration (No. 2,684,008) for the mark QUANTUM in standard character form for "wine" in Class 33.<sup>2</sup> Opposer alleges that based "on the similarities in the marks and the related nature of the goods in issue, as well as the likely overlap in the channels of trade, the public is likely to be confused, mistaken or deceived as to the origin and sponsorship of Applicant's proposed goods to be marketed under Applicant's applied for 'QUINTUS' trademark..." Notice of Opposition at 3. Applicant denied the salient allegations of the notice of opposition.

#### The Record

The record consists of the following items: the pleadings; the file of the involved application; the trial testimony deposition of Alan M. Perlman, opposer's linguist, with accompanying exhibits; and a Notice of Reliance containing status and title copies of opposer's registration.

#### Priority

Priority is not an issue here to the extent that opposer relies on its ownership of a federal registration for the mark QUANTUM. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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<sup>2</sup> The registration issued February 4, 2003 and it is based on an application filed March 31, 1999.

Likelihood of Confusion

When the issue is likelihood of confusion, we analyze the facts of the case under the factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000); In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, its asserted ground of likelihood of confusion. See Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

Two important factors that we consider in likelihood of confusion cases are the ones concerning the similarity of the marks and the relatedness of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We look first at the goods. Here, both applicant's and opposer's goods are identified simply as "wine." Inasmuch as we must compare the goods as they are described in the application and the registration to determine if there is a likelihood of confusion, there is no question but that the goods are identical. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d

1813, 1815 (Fed. Cir. 1987). We add two other points concerning identical goods. First, if the involved marks are used on identical goods, there is a greater likelihood that when similar marks are used in this situation, confusion would be likely. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines"). Second, because the goods are identical, we must assume that they travel through the same channels of trade and that the potential purchasers are the same. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages").

The next factor requires us to compare the parties' marks as to the "similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression." Majestic Distilling, 65 USPQ2d at 1203. It is well settled that it is improper to dissect a mark and that marks must be viewed in their entireties. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed.

Cir. 1993). However, more or less weight may be given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark is the word QUINTUS and opposer's mark is the word QUANTUM. Since both marks are displayed in typed or standard character form, there is no difference concerning the display of the marks. Regarding the appearance of the marks, opposer argues as follows:

Each of the marks "Quantum" and "Quintus" begin with the letter combination "QU," which is by itself an unusual combination of letters, immediately being eye-catching... Both terms have a vowel after the "QU", followed by "NT", followed by a vowel and, in the case of "Quantum", an "M" and, in the case of "QUINTUS", an "S."

Brief at 3-4 (Citations to record omitted).

We agree that there are similarities with the appearance of the marks to the extent that the marks have certain letters in common. Both do begin with the letters "QU." However, we are not persuaded that this is "eye catching."<sup>3</sup> "Q" is one of the letters of the western

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<sup>3</sup> Despite the claim by opposer's linguist that its mark is "eye catching," it submitted numerous examples of registered marks for wine that begin with "Qu," e.g., QUINSON, QUINTA DO CASTELINHO, QUAIL HILL VINEYARD, QUINTET, and QUIERO. Opposer introduced this evidence during the linguist's testimony in the form of a trademark search report, which is normally not appropriate. Weyerhaeuser Co. v. Katz, 24 USPQ 1230, 1231 (TTAB 1992) (A "trademark search report is not credible evidence of

alphabet, and it almost always requires the letter "U" as the letter following the letter "Q."<sup>4</sup>

When we look at the appearance of the marks as a whole, it is clear that the marks are both seven letter words that begin with the letters "QU" and have the letters "NTU" in the middle. However, they are different to the extent that their initial vowel, the third letter, is a different vowel and the final letter is different. Thus, while there are similarities with the appearance of the marks, there are also differences.

Regarding the pronunciation of the marks, opposer argues (Brief at 4, citations to the record omitted):

They have almost the same phonetic structure; they have the same sequence of vowels and consonants with many sounds in common. Thus, five of the seven sounds in "QUINTUS" are identical to five of the seven sounds in "QUANTUM." Finally and equally important, both "QUANTUM" and "QUINTUS" have the same morphemic structure. A morpheme is a minimal meaningful unit.

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the existence of the registrations listed in the report"). However, third-party registrations may be used as a form of dictionary to demonstrate that a portion of a mark is suggestive or descriptive. In *re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987). These registrations, used as a dictionary, would also indicate that the "Qu" term is not unusual. Inasmuch as opposer has submitted this registration search report and applicant has not objected, they are a form of admission of opposer that undercuts its witness' testimony about the "eye-catching" nature of the "QU" portion of its mark.

<sup>4</sup> "When adopted from the Etruscans, the Latin alphabet contained three symbols for the k-sound (See C, K), and the use of Q was limited to representing the sound (k) when it was labialized and followed in spelling by U, a practice maintained today with only rare exceptions." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987) 1576. We take judicial notice of this dictionary information. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In both cases, there is a morphemic root, "QUANT" in one case, "QUINT" in the other, and a morphemic suffix "UM" in the one case, and "US" in the other.

Again, there are some similarities and differences between the pronunciations of the marks. Ultimately, we conclude that when the marks are pronounced, the marks would not sound very similar and that there would be noticeable differences between QUANTUM and QUINTUS. The differences between the initial vowels and the last letter create marks that would have significantly different pronunciations.

Next, we look at the meanings of the marks. Opposer has submitted dictionary definitions of both terms (Perlman Ex. 6). Quantum is defined as "Quantity, Amount." There are separate definitions for "Quantum Mechanics" and "Quantum Theory." "Quintus" is defined as the "fifth voice or part in medieval music." On the surface, both marks have different meaning although we question whether many prospective purchasers would be aware of the dictionary definition of "quintus." Applicant's witness asserts that the terms "would be two-syllable words that are Latin sounding or at least foreign sounding." Perlman dep. at 28. However, "quantum" is a recognized word in English but the term "quintus" is more likely to be viewed as a Latin sounding word. The term "quint" is defined as an abbreviation of "fifth," (Perlman Ex. 6) and prospective purchasers may associate the term "fifth" with applicant's

mark. Therefore, the meanings of the marks would not be similar.

Another point of comparison is the commercial impressions of the marks QUANTUM and QUINTUS. It is likely that purchasers would view opposer's mark as the recognized English word "Quantum." Applicant's mark "Quintus" is an unusual term that would likely create the impression of either an arbitrary term with no established meaning or a term with a Roman or Latin connotation. Neither term would have any connection with the wine. We conclude that the marks' commercial impressions would not be similar.

When we compare the marks QUANTUM and QUINTUS, they would appear somewhat similar in appearance inasmuch as only two of the seven letters differ. Nevertheless, those two different letters significantly change the pronunciation of the marks and their meanings would not be the same. Their commercial impressions would likewise be different. When we consider the differences, we cannot hold that the marks are similar. We are mindful that a "[s]ide by side comparison is not the test," Grandpa Pigeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973), and that "[h]uman memories even of discriminating purchasers ... are not infallible." In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434



F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). However, we cannot conclude that the term "Qu" is so unusual that customers will attribute all identical products with these initial letters to the same source. Nor is it likely that customers will associate the recognized English word QUANTUM with the unusual term QUINTUS. The difference between the middle and ending of the words results in substantially different marks.

Regarding the other factors on the issue of likelihood of confusion, we add that there is no evidence that opposer's mark is famous nor is there evidence of actual confusion. Inasmuch as applicant's mark is based on an intent to use the mark, the lack of actual confusion is hardly surprising and neither this factor nor the fame factor favors either party. There is also no evidence that potential purchasers of wine are careful or sophisticated purchasers and the board has held that wine purchasers are not necessarily sophisticated purchasers. In re Opus One Inc., 60 USPQ2d 1812, 1817 (TTAB 2001). None of the other factors in this case is significant.

One other point we add concerns opposer's linguistic expert. Opposer's witness testified on the ultimate question of likelihood of confusion. We do not give the witness' testimony much weight on this subject for several reasons. First, the witness did not submit evidence that he

was an expert, or even familiar with, the marketing of wines. Other than his linguistic studies, the witness pointed "to nothing in that experience that provided him with expertise in determining the likelihood of confusion in the purchase of similarly named" wine. Betterbox Communications Ltd. V. BB Technologies Inc., 300 F.3d 325, 64 USPQ2d 1120, 1128 (3<sup>rd</sup> Cir. 2002). Second, the witness' testimony seemed to address the question of the potential for confusion rather than likelihood of confusion. See Perlman dep. at 34 ("So the potential for confusion which is introduced by the linguistic similarities between the two marks would be exacerbated by the context in which they are likely to be seen"); 35 ("The potential for confusion is inherent in the words, and that potential can be exacerbated by the natural conditions under which we perceive language, which tend to distract us and to create the possibility for misinterpretation"). Indeed, the witness agreed that the impressions of the marks were "different but not strikingly so." Perlman dep. at 29. The witness explained (p. 29):

[I]f you wrote those two words down and asked someone to compare them, are they the same word or not, the person would say, "they're not the same word," but that's very different from hearing the word in conversation or against the buzz of background noise.

The testimony apparently concentrated on whether the marks could ever be confused. However, whether there is a possibility of confusion is not the question. Many

dissimilar marks could be confused in the proper circumstances due to external factors or inattention on the part of listeners. Nevertheless, the question we must consider is whether there is a likelihood of confusion. Bongrain International (American) Corp. v. Delice de France, Inc., 811 F.2d 1479, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987) (The "statute refers to likelihood, not the mere possibility, of confusion"). Ultimately, even if the witness was addressing the appropriate issue, we are not persuaded that there is a likelihood of confusion in this case.

When we consider all the evidence of record, we conclude that while there are some similarities between the marks QUANTUM and QUINTUS, we agree that the differences in pronunciation, appearance, meaning and commercial impression outweigh any similarities in the marks. Therefore, we hold that there is no likelihood of confusion in this case. Kellogg Co. v. Pack'em Enterprises Inc., 951 F.2d 330, 21 USPQ 1142, 1143-44 (Fed. Cir. 1991) (FROOTEE ICE and elephant design is so different from FROOT LOOPS that even if goods were closely related and opposer's mark were famous there was no likelihood of confusion).

Decision: The opposition is dismissed.